A DISCHARGE IN INSOLVENCY, AND ITS EFFECT ON NON-RESIDENTS.

NO question of private international law has given more trouble to the courts of the different States and of the United States during the present century than the question what effect a discharge in insolvency should have upon non-residents. Dissenting opinions have been frequent, and numerous cases have been overruled. Statutes have been declared constitutional, and then have been held to be unconstitutional, or have been disregarded as of no effect. Well-established principles have been repudiated, or else lost sight of; questions of international law have been confused with questions of constitutional law; and if at last we have reached a certain uniformity of decision, it has been by a process so unsatisfactory that the questions involved can hardly be said to have received a final answer.

On the theory that nothing can be considered as settled until it is settled rightly, it is my purpose in this article to consider the soundness of the doctrines now accepted, and to call attention to some of the decisions, and especially to the following recent cases: Pullen *v.* Hillman, 84 Me. 129 (1891); Phenix National Bank *v.* Batcheller, 151 Mass. 589 (1890); Lowenberg *v.* Levine, 93 Cal. 216 (1892).

In these three cases it is to be noticed at the outset that the question was not what the State courts of Maine, Massachusetts, and California should do as a matter of comity, but what effect they should give to express legislative enactments of the States under whose power the courts were acting.

There is a very wide difference between cases where the discharge pleaded was obtained in a foreign country, or in another State, or under another sovereignty, and those cases where the discharge pleaded was obtained under the laws of the State from which the court derives its power. In the case of a foreign discharge the court may on various grounds refuse to give effect to the foreign law and to the discharge obtained under it, since the laws of a State or country have *ex proprio vigore* no extra-territorial force. In this, as in all questions of foreign law, the question is one of comity.

But when a court is called upon to deal with the effect of the legislation of its own State, it must either obey it or else declare it to be unconstitutional. The fact that the courts of other States or sovereignties have declared the legislation in their opinion to be unwise, and have refused to give it effect, affords no ground for the domestic tribunal to follow their example. The latter may point out the foolishness of existing statutes, and may call attention to the fact that the courts of other sovereignties have refused to give them any effect. When the domestic court has done this, and has urged a repeal of the objectionable statute, it has, as it would seem, exhausted its power and performed its whole duty. The courts of a State are bound to obey the command of its Legislature, whether it agrees with international law or not, unless (in the United States) the Legislature has exceeded its constitutional powers.[1]

The general principles of international law which were supposed to determine the effect upon non-residents of a discharge in insolvency were well stated some fifty years ago by Judge Story in his treatise on the Conflict of Laws, secs. 242, 280, 331, 340. He states the rules as follows: —

"The general rule is that a defence or discharge good by the law of the place where the contract is made or is to be performed, is to be held of equal validity in every other place where the question may come to be litigated.

"The general form in which the doctrine is expressed, that a discharge of a contract by the law of the place where it is made is a discharge everywhere, seems to preclude any consideration of the question between what parties it is made, whether between citizens, or between a citizen and a foreigner, or between foreigners."

The foregoing principles were drawn by Judge Story chiefly from the Roman law, the Continental jurists, and the English decisions, from which latter he cites the opinion of Lord Mansfield in Ballantine *v.* Golding, reported in Cooper's Bank. Laws, 5th ed., p. 347, and the opinion of Lord Ellenborough in Potter *v.* Brown, 5 East, 124, decided in 1804. The Courts in England have followed the above principles consistently up to the present time.[2]

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[1] Story, Conflict of Laws, sec. 348; Ellis *v.* McHenry, L. R. 6 C. P. 228; McCann *v.* Randall, 147 Mass. 92, 93; Penniman *v.* Meigs, 9 Johns. 325; Murray *v.* DeRottenham, 6 Johns. Ch. 52.

[2] Phillimore's International Law, 3d ed., vol. 4, p. 632; Ellis *v.* McHenry, L. R. 6 C. P. 234 (1871); Leake's Law of Contracts, 3d ed. (1892), p. 895.

In the United States the courts almost at the outset fell into difficulty over the point suggested by Judge Story in sec. 340 above cited; namely, the effect of a diversity of citizenship among the contracting parties. The question has been further complicated by certain provisions of the Constitution of the United States. The result is, that the principles above enumerated have been widely departed from.

Previous to the adoption of the United States Constitution in 1789, several of the States had had, at different times, insolvent laws with varying provisions, some providing for the discharge of unfortunate debtors, and others exempting them from arrest. It was also beginning to be a matter of rather frequent occurrence for debtors in failing circumstances to apply to the Legislatures of their respective States for special Acts granting them relief from their existing debts. The power of the several Colonies to enact such laws apparently never was questioned.

With the Union of the States, however, there came a number of restrictions upon this exercise of sovereign power. The United States Constitution contained, first, a provision giving the Congress of the United States authority to establish uniform laws on the subject of bankruptcies throughout the United States, and second, a clause forbidding the several States to pass any laws impairing the obligation of contracts.

Among the States which earliest enacted insolvent or bankrupt laws after the Union in 1789 were New York, Pennsylvania, Maryland, and Louisiana; and the first reported decisions are as to the effect of discharges granted under the statutes of these States. It was early settled that the provisions of the United States Constitution giving Congress power to pass a bankrupt law did not in the absence of any action on the part of Congress take away the power of the States to pass State bankrupt or insolvent laws.[1] This question was afterwards argued by Daniel Webster in Ogden *v.* Saunders[2] as being still open, but was considered by the court to have been settled by their decision in Sturges *v.* Crowninshield.

The effect of the clause in the United States Constitution forbidding the States to pass any laws impairing the obligation of contracts also came up for consideration at an early day, and has been coming up ever since; and it is only of late that it can be said to have received a final answer.

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[1] Sturges *v.* Crowninshield, 4 Wheaton, 122 (1819).

[2] 12 Wheaton, 249 (1827).

The first important case upon the subject was that of Sturges *v.* Crowninshield.[1] In this case it was held that the States may pass insolvent laws, provided there is no United States bankrupt law in force; but such State insolvent laws are unconstitutional in so far as they undertake to discharge or impair existing contracts. The language of the court was broad enough to make all State insolvent laws, whether prospective or restrospective, unconstitutional, and the language of the court in M'Millan *v.* M'Neill,[2] was such as to induce a belief that the court meant to declare all State insolvent laws unconstitutional, as impairing the obligation of contracts.

But in Ogden *v.* Saunders,[3] four of the judges, being a majority of the court, declared that so far as future contracts were concerned, a State law was constitutional. The chief grounds for so declaring were that the language used in the Constitution was not entirely clear, and it was not to be supposed that the States intended to part with their power to regulate and discharge future contracts, and that it would be too much of a curtailment of the powers of the States to hold that the regulation and discharge of future contracts were taken away. Judge Johnson was one of the four judges so holding. But on the question of the extra-territorial effect of a discharge in insolvency, he was ready to hold that its effect must be confined to the State courts of the State where the discharge was granted, and that non-residents could go into the United States courts or into the courts of other States, and there be free from the effect of the discharge. A majority of the court concurred with him in this view. In Baldwin *v.* Hale[4] this view was approved and followed; and again in Denny *v.* Bennett[5] it is said, "The proposition lying at the foundation of all these decisions is that a statute of a State, being without force in any other State, cannot discharge a debtor from a debt held by a citizen of such other State." See also language of the court in Cole *v.* Cunningham,[6] to the same effect.

The language used in these cases has been supposed to extend even to the case of a non-resident creditor who sues the debtor in the State courts of the State granting the discharge, and several cases have been decided in the State courts in accordance with this supposed doctrine, among them the three cited at the beginning of this article.

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[1] 4 Wheaton, 187 (1819).
[2] 4 Wheaton, 209.
[3] 12 Wheaton, 213 (1827).
[4] 1 Wall. 223 (1863).
[5] 128 U. S. 497 (1888).
[6] 133 U. S. 114, 115 (1800).

It is the soundness of this doctrine and the correctness of the cases decided under it that I desire especially to consider. The doctrine in question was briefly stated by the Hon. I. F. Redfield in a note to Baldwin *v.* Hale, published in 1863, in 12 Am. Law Reg. 469. He says, in substance, that the validity of the discharge must depend upon the extent of the jurisdiction of the tribunal which renders the judgment or decree granting it; the court must have jurisdiction over both the debtor *and the creditor.* It can have no jurisdiction over the contract which attends the person of the creditor, unless the creditor submits it to the court and claims a dividend. Otherwise the case is the same as a personal action where the defendant is not within the jurisdiction and does not appear in the suit.

The doctrine was again stated by Guy C. H. Corliss, Esq., of St. Paul, Minn., in an article published in 1884 in the Albany Law Journal, vol. 29, page 186. He uses the following language: "The question is one of jurisdiction, and is to be settled by the residence of the creditor at the time of the institution of the insolvency proceedings. . . . Whether at the time of the execution of the contract he was a citizen of the State in which the discharge was granted is therefore immaterial to the inquiry. . . . The proceedings do not bind citizens of another State who have not voluntarily appeared and waived their rights. . . . They do not bind him even when he seeks to enforce his claim in the very court which granted the discharge. . . . Nor even though the contract was governed by the laws of that State."

We may safely say, I think, that there is no longer any ground for holding that a discharge in insolvency is void against a non-resident because of any constitutional objection arising under the clause forbidding a State to pass laws impairing the obligation of contracts. It seems now to be settled that the inhibition of the Constitution applies only to legislation having a retrospective effect. If an insolvency law precedes the contract, it does not, within the meaning of the Constitution, impair its obligation.[1]

No other clause of the United States Constitution has been pointed out as yet which limits the power of the States in regard to insolvency matters, and it is fair to assume that there is none.

[1] Edwards *v.* Kearzey, 96 U. S. 601 (1877); Denny *v.* Bennett, 128 U. S. 495 (1888); Butler *v.* Goreley, 146 U. S. 303 (1892); People's Sav. Bank *v.* Tripp, 13 R. I. 621; Miller on the Constitution of the U. S. 531. See, however, Black on Constitutional Prohibitions, secs. 116–124 (1887), for some views to the contrary.

The Fourteenth Amendment, to be sure, furnishes a limitation as to the jurisdiction of State courts in personal actions, but, as I shall point out later, does not undertake to limit the power of the States in proceedings *in rem*.

Before proceeding to any analysis of the principles which enter into the question of the power of a State court to grant a discharge, I invite attention to a brief review of some of the cases in a few of the different State courts, for the purpose of showing, first that the courts in nearly every State were, at the outset, disposed to give full effect to the doctrine that a discharge granted at the place, *i. e.*, in the State or country, where the contract was made, should be given effect everywhere, as well against creditors who were non-residents as against those who were residents of the State granting the discharge; and second, that this disposition of the State courts was changed after the case of Ogden *v.* Saunders, because it was supposed by many of the judges that the United States Supreme Court had decided on some constitutional ground that a discharge in insolvency could have no extra-territorial effect.

I take the States in geographical order.

Maine. — The question in every case except the two latest ones was a purely international one: namely, what effect the court in Maine should give by way of comity to discharges obtained in other States or countries.

Among the early cases we find that of Very *v.* McHenry.[1] In this case a discharge obtained in New Brunswick was held good in Maine against a citizen of Maine, the contract sued on having been made in New Brunswick. The decision is based on the English doctrine that the *lex loci contractus* as a matter of comity should be allowed to govern.

Three years later, in Palmer *v.* Goodwin,[2] and Bancher *v.* Fisk,[3] the same court held discharges obtained in Massachusetts of no effect in Maine against non-residents. In the last of these cases, it is stated that the United States Supreme Court in Ogden *v.* Saunders decided as a matter of constitutional law that a discharge has no effect on a contract made with a citizen of another State.

Four years later, in Long *v.* Hammond,[4] and Mansfield *v.* Andrews[5] discharges in New Brunswick were again held good in Maine. In Felch *v.* Bugbee,[6] and Chase *v.* Flagg,[7] the court again

[1] 29 Me. 206 (1848).
[2] 32 Me. 525 (1851).
[3] 33 Me. 316 (1851).
[4] 40 Me. 204 (1855).
[5] 41 Me. 591 (1856).
[6] 48 Me. 9 (1859).
[7] 48 Me. 182 (1859).

refused to give effect to discharges obtained in Massachusetts as against non-resident creditors, though the note sued on was in one instance made in Massachusetts, and by its terms was payable there.

In Hills *v.* Carlton,[1] we have a case of the kind above referred to: namely, of a discharge obtained in Maine, and pleaded in a Maine Court against a non-resident creditor. The court, on the doctrine of a want of jurisdiction as laid down in Baldwin *v.* Hale, held the discharge no bar. Nothing is said about the Maine statute being unconstitutional, and no notice is taken of the fact that the court is disregarding an express statutory enactment of its own State.

In the case of Pullen *v.* Hillman, [2] we have one of the latest decisions on the subject under consideration. The suit was a note made in Maine and expressly payable in Maine, the maker and payee at the time the note was given being both citizens of Maine. After the note was given, the payee moved to New York, and the maker, becoming insolvent, obtained a discharge in Maine. It was held that according to the doctrine of Baldwin *v.* Hale [3] and Pennoyer *v.* Neff,[4] the court granting the discharge had no jurisdiction over the creditor, and that hence the discharge was no bar. The case of Stoddard *v.* Harrington,[5] where the same question was decided in the opposite way, is noticed and disapproved. No notice is taken of the fact that the court is nullifying a statute of Maine without declaring it unconstitutional, and no attention is given to the language of the United States Supreme Court in Cole *v.* Cunningham,[6] according to which the citizenship of the debtor and creditor at the time the debt was contracted is what will govern.

It is interesting to compare this case with Lowenberg *v.* Levine,[7] where the court held that even though the creditor was a resident of the State during the insolvency proceedings, the discharge was no bar, since he was a non-resident when the contract was made.

New Hampshire. — None of the cases in New Hampshire, save the two latest, have involved anything more than an international question. In all the earlier cases the discharges under consideration had been obtained in some other State or country. In Stevens *v.* Norris,[8] which was the case of a discharge obtained in Massachusetts, the court, after a careful consideration, fully adopted and approved the doctrine that the *lex loci contractus* ought to

[1] 74 Me. 156 (1882).
[2] 84 Me. 129 (Dec., 1891).
[3] 1 Wall. 223.
[4] 95 U. S. 714.
[5] 100 Mass. 87
[6] 133 U. S. 115.
[7] 93 Cal. 216 (1892).
[8] 30 N. H. 466 (1855).

govern, without reference to the residence or citizenship of the parties.

Two years later, in Whitney *v.* Whiting,[1] the court felt constrained by Ogden *v.* Saunders to hold a discharge no bar, it being supposed that the United States Supreme Court had decided that where the contract was made with a non-resident, a State insolvent law granting a discharge was unconstitutional, as impairing the obligation of the contract.

Three years later, in Brown *v.* Collins,[2] the court held that where a note was made in Massachusetts, and by its terms was expressly made payable there, a discharge in Massachusetts could and should be held good in New Hampshire.

Four years later, Brown *v.* Collins was overruled by New Market Bank *v.* Butler,[3] where on the same state of facts it was held that a discharge in Massachusetts was no bar in New Hampshire. The decision is based on Baldwin *v.* Hale, which the court supposed to be decided on constitutional grounds under the section of the United States Constitution forbidding States to pass laws impairing the obligation of contracts. In Stirn *v.* McQuade,[4] the court again nullified a New Hampshire statute, and held a discharge granted in New Hampshire no bar as against a non-resident, the reason for the decision being a supposed want of jurisdiction.

Vermont. — In Herring *v.* Selden,[5] the court held that under Sturges *v.* Crowninshield it must be held that all State insolvent laws are unconstitutional. In Peck *v.* Hibbard,[6] the court held a discharge in Canada good in Vermont, and fully approved the doctrine that the *lex loci contractus* ought to govern.

In Bedell et al. *v.* Scruton,[7] a discharge in Vermont was held no bar as against a non-resident. The Vermont insolvent law was not expressly declared unconstitutional, but it was held to be inoperative.

In McDougall *v.* Page,[8] the case was twice argued, and the court was divided; but it was decided that a discharge under the United States bankrupt law was no bar against an alien non-resident where the contract was made and was to be performed in Canada. The language of the United States Bankrupt Act was held to be so far uncertain as to allow the court to construe it not to apply to non-resident aliens, the contract being a foreign one. The court, as

[1] 35 N. H. 457 (1857).
[2] 41 N. H. 405 (1860).
[3] 45 N. H. 236 (1864).
[4] 22 Atl. Rep. 451 (1890).
[5] 2 Aiken, 12 (1826).
[6] 26 Vt. 698 (1854).
[7] 54 Vt. 493 (1882).
[8] 55 Vt. 187 (1882).

it would seem, admitted that if the language of the United States Bankrupt Act had been peremptory, it would have been binding upon the court.

In the latest case in Vermont, Roberts *v.* Atherton,[1] a discharge in Vermont was held void as against a non-resident, because the creditor was outside the jurisdiction of the court at the time the petition in insolvency was filed. The case is decided on jurisdictional, and not on constitutional, grounds.

Massachusetts. — The following are the leading cases: Blanchard *v.* Russell,[2] in which the doctrine that the *lex loci contractus* ought to govern was fully indorsed; May *v.* Breed,[3] in which a discharge in England of a contract made there was held good in Massachusetts; Scribner *v.* Fisher,[4] in which it was held that a discharge in Massachusetts of a contract made and by its terms to be performed there should be held good in Massachusetts, even against a non-resident creditor; Kelley *v.* Drury,[5] in which, on account of Baldwin *v.* Hale, Scribner *v.* Fisher was overruled; Stoddard *v.* Harrington,[6] in which it was held that if the debtor and creditor were both residents of Massachusetts when the contract was made, a discharge in Massachusetts would be a bar even if the creditor moved out of the State before the insolvency proceedings were instituted; Phenix Bank *v.* Batcheller,[7] in which Kelley *v.* Drury was followed, if not approved.

Rhode Island. — In Pattison *v.* Wilbur,[8] a discharge under the United States bankrupt law was held good against an alien non-resident, the contract having been made in the United States, and the creditor having moved to Scotland before the bankruptcy.

New York. — It was early held that if according to the provisions of a New York insolvent law or the United States bankrupt law a discharge was expressly declared to be a bar, the courts of New York must give it that effect.[9]

In Mather *v.* Bush,[10] the doctrine that the *lex loci contractus* ought to govern was fully approved; but later, in Donnelly *v.* Corbett,[11] and Soule *v.* Chase,[12] the court, on supposed constitutional grounds, followed the United States cases, and held a discharge ob-

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1 60 Vt. 563 (1888).
2 13 Mass. 1 (1816).
3 7 Cush. 15 (1851).
4 2 Gray, 43 (1854).
5 9 Allen, 27 (1864).
6 100 Mass. 87 (1868).
7 151 Mass. 589 (1890).
8 10 R. I. 448 (173.)
9 Penniman *v.* Meigs, 9 Johns. 325 (1812); Murray *v.* DeRottenham, 6 Johns. Ch. 52 (1822).
10 16 Johns. 233 (1812).
11 7 N. Y. 500 (1852).
12 39 N. Y. 342 (1868).

tained under a State insolvent law to be no bar against a non-resident, even in the State where the discharge was granted. In Pratt *v.* Chase [1] the same result was reached, but more was said about want of jurisdiction than about unconstitutionality. In Phelps *v.* Borland,[2] a discharge in England of a contract made there was held no bar in New York against a citizen of New York.

Maryland. — There is one point which is peculiar to Maryland. It was early held, in the case of Larrabee *v.* Talbott,[3] that inasmuch as it must be held under the United States cases that all State insolvent laws are unconstitutional as against non-residents, it must also be held that a non-resident creditor can come into the State courts of Maryland and take from the assignee in insolvency any assets in his hands. This apparently continued to be the law in Maryland down to 1884, when, in the case of Pinckney *v.* Lanahan,[4] the court held, on the strength of Crapo *v.* Kelly,[5] that the statutory title of the assignee was good within the State, even as against non-resident creditors.

The necessary limits of this article prevent anything more than a cursory reference to a few of the cases in some of the States. For the convenience of those desiring to make a study of the subject, a list of cases, which is believed to be quite complete, is given in a note printed at the end of this article.

SUMMARY. — The foregoing examination of the cases shows that the doctrine has become very generally accepted that a discharge will be of no effect (even in the courts of the State where the discharge is granted) against a non-resident creditor, unless he becomes a party to the insolvency proceedings by voluntary appearance and participation in the same, or is made a party by a legal service of process, — by which is meant personal service, and not merely a publication of notice.

First Objection to this Doctrine. — It is to be noticed, first, that it has not usually been considered necessary, in order to give jurisdiction to a bankruptcy court, to require any service of process, so far as creditors are concerned, except a publication of notice and a sending of notice by mail to those of the creditors resident and non-resident whose address is ascertained. Under the English Bankruptcy Acts and the several United States Bankrupt Acts, and under the Massachusetts insolvent law, and I think under the

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[1] 44 N. Y. 597 (1871).
[2] 103 N. Y. 406 (1886).
[3] 5 Gill, 426 (1847).
[4] 62 Md. 447 (1884).
[5] 16 Wall. 610.

various State insolvent laws, this his been the only notice considered practicable or necessary.

Second Objection. — Every Bankrupt Act which contains a provision for the debtor's discharge has two chief ends to accomplish, — first, a distribution of all the existing property of the debtor; and, second, a release of the debtor from his existing obligations. The distribution of the property is not necessarily to be an equal or ratable one. Certain allowances are made to the debtor and his family. Certain claims, *e.g.*, those for taxes and wages, are given a preference, either for their full amount or for a proportionate part. The whole proceeding is an arbitrary act of the sovereign power which has for the time being control over the person and property of the debtor. The proceeding is designed, not simply to secure what seems to be an equitable division of the debtor's assets, but also is intended for the debtor's benefit, to raise him out of a hopeless condition of despondency likely to land him in the poorhouse or asylum. The insolvent law seeks to put him in the way of retrieving his shattered fortunes and of becoming a useful member of society, able to provide for his own support and that of his family, and perchance to contribute something to the support of the government under which he lives.

The public benefit which is aimed at is the justification of the government for the arbitrary exercise of its power. The proceeding is had not simply for an adjustment of the relations between the debtor and his creditors, but because the whole community in which the debtor lives and of which he forms part are interested in having him put on his feet again.

Every member of society stands in certain relations to those around him, and has certain capacities of acting towards them and with them. Of these relations and capacities some are domestic, some are civil, and some are contractual. The sum of these relations and capacities constitutes the status of the individual. The status of an individual at any particular time is to be determined by the court before which his status in any particular becomes a matter in issue. But it has generally been considered that the status which a person has at the place of his domicile, *i. e.*, where he resides, is to be especially regarded in determining his status elsewhere.

If a person comes before or is brought before a court in the place of his domicile, and the question of his status in any particular which affects the public welfare becomes a question to be de-

termined, it has been generally considered that the proceeding so far partakes of the nature of a proceeding *in rem*, that the court, after such a publication or sending of notice as has been prescribed by the government of that country, acquires jurisdiction to determine what the status of that person is; and the decision of the court is held to be binding on all the world so far as all the world comes into that country, — or, rather, comes within the power of that government of which the court forms a part. To illustrate, — the marital relation originates in a contract entered into with more or less of ceremony and solemnity. Each of the parties to the marriage contract acquires a certain relation which forms a part of the status of each. How is the legality of this relation to be determined, or if need be, how is the relation to be terminated? Must the court have both the parties to the marriage before it, or can it, if one is before it, determine the status of that one? It would seem now to be quite well established that the court where one of the parties is domiciled may, on the application of that party, after a publication or sending of notice, acquire jurisdiction to grant a divorce even though the other party is out of the country and cannot be served with process or compelled to come before the court.[1] Other sovereign powers may not admit the validity of the decree; but in the United States other States, under the Constitution as it is now generally considered, must give it full faith and credit.

Now, what I desire to suggest is that the contractual relation in which a debtor stands towards his creditors is a part of his status; that the Legislature of the State or country in which the debtor is domiciled may, on grounds of public policy, give the courts of that State the power to terminate this relation and alter this status of the debtor and make it something different from what it was. Other sovereign powers may not recognize the change of status, but within the power of the sovereignty which has declared the debtor's status, this status must be recognized, and effect given to it. The doctrine which I have enunciated or attempted to enunciate is not without the support of recent authority.[2]

It would seem to be on this theory alone that a discharge in

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[1] Black on Judgments, vol. 2, sec. 925.

[2] See Black on Judgments, vol. 2, sec. 807, and cases cited; Pennoyer *v.* Neff, 95 U. S. 714, 722, 734.

bankruptcy under the United States bankrupt law can be properly held binding within the United States on alien non-residents not served with any process.[1]

According to this doctrine, a discharge of a debtor under a State insolvent law ought to determine the status of the debtor within the State granting the discharge, or at least while he is within the power of the State courts of that State; and it ought to be a good bar to any action, even by a non-resident creditor who comes into the State, and who, by going into the State courts, subjects himself to the power of the State and puts the State to expense on his behalf.

It follows also from the foregoing that the courts of the United States sitting in the State where the discharge is granted (and where in their common law proceedings they ordinarily act according to the State law) ought to recognize the status which the debtor has acquired under the laws of that State. The question is not the ordinary one of expediency or comity; it is a question of interfering between the individual citizen and the government to which he owes the most immediate allegiance. It is in effect saying to the debtor, "Your State government, to be sure, has decreed that you shall have on your native soil a certain status; but this court will not recognize this status, because there are persons in other States who did not assent to the decree, and this court considers their rights as paramount to the rights of the community in which you live.

Third Objection. — The doctrine of the non-effect of a discharge as against non-resident creditors is not in harmony with the other rules which are applied to insolvency cases. As already stated, one chief end of a State insolvent law is to make distribution of the debtor's existing assets. To accomplish this, the State authorizes an arbitrary seizure of the same, and transfers the title or right to administer to a public officer, called usually an assignee. There is the same exercise of arbitrary power in this seizure of the debtor's property that there is in the determination of the debtor's status and the giving him of a new status. If the State has power as against non-resident creditors to do the one, it would seem to follow that it has power to do the other.

That it has power to seize the property and hold or distribute it even as against non-residents is generally conceded. In Maryland

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[1] See Bump on Bankruptcy, 9th ed., pp. 727, 746.

it was supposed for a long time that the State did not have this power; but now even there the power is exercised.[1]

If a State in the exercise of its sovereign power may on grounds of public policy seize the existing property of a poor debtor and say what shall be done with it, why may it not also, in the exercise of the same power and for like reasons, say what shall be done with the after-acquired property of the debtor, even to the extent of freeing it from the claims of any existing creditors, resident or non-resident? Other States, to be sure, may not give such laws any extra-territorial effect; but that need not prevent the State from freeing the debtor and keeping him free while he remains upon his native soil and within the power of the State government.

The present jurisdictional doctrine as I trace it owes its origin to the language of Judge Johnson in Ogden *v.* Saunders,[2] where he says, in substance, that proceedings in insolvency are judicial in their nature, and that all parties whose rights are affected are entitled to a hearing. This language was repeated and enlarged in Baldwin *v.* Hale,[3] and has been repeated in many cases in the State courts as decisive of the whole question.

No consideration of the accuracy of this language has been had, so far as I am aware; but it has always been accepted by the courts without question or criticism. I desire now to suggest that the language used by Judge Johnson may have been pushed farther than he intended that it should be. If the head-note in Ogden *v.* Saunders truly indicates the scope of Judge Johnson's views, he did not mean to say that a discharge granted under a State insolvent law could not be a bar against a non-resident creditor in the courts of the State granting the discharge.

I desire further to suggest that the doctrine that proceedings in insolvency are essentially the same as personal actions, so that the same service of process is required in order to give jurisdiction, is altogether erroneous.

I have already fully explained how it is that the question of a debtor's discharge is a question as to his status, the determination of which is in the nature of a proceeding *in rem*. Let us examine

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[1] Pinckney *v.* Lanahan, 62 Md. 447 (1884). See Crapo *v.* Kelly, 16 Wall. 610 (1872), in which it was held by the United States Supreme Court (two judges dissenting) that a statutory assignment, under a State insolvent law, of property actually within the State was good even as against a non-resident creditor. Geilinger *v.* Philippi, 143 U. S. 246, is to the same effect.

[2] 12 Wheaton, p. 366.

[3] 1 Wall. p. 233.

now a little further, and see if the reasons which require service of process upon a defendant in a personal action apply to the case of an insolvency proceeding having for its end the granting of a discharge to the debtor. A personal action by a creditor against his debtor has for its chief, if not for its sole, purpose the enforcement of the individual rights of that creditor against the debtor. The public have no particular interest in the controversy. The debtor is entitled to be heard before a judgment is rendered, because he may have some defence which will show that the plaintiff is not really a creditor at all. If he is not before the court and has no legal notice, the court cannot pass any just decree. But when we come to an insolvency proceeding we come to a proceeding in which a decree is to be made on grounds of public policy, to promote a public benefit. If a non-resident creditor has a particular interest which is in conflict with the public welfare, the court, acting under power from the State, may say that the private interest shall give way.

Possibly some one will object to this, and say that it will violate the rule that private property shall not be taken without compensating the owner. The answer to this is that the claim of the creditor against his debtor is not an absolute and unconditional one. It may fairly be assumed that every man, when he lends another money without security, or sells him goods on credit, and becomes his creditor, does so with more or less of apprehension that his debtor may become bankrupt and fail to pay him.

The insolvent laws, as well as all the other laws existing and in force when the contract is made, form a part of it, or at least govern it, so that if the debtor becomes insolvent and is granted a discharge, that only has happened which the parties at the outset must have contemplated as possible. Still further, there is no imperative reason, so far as the debtor's discharge is concerned, why each creditor should have notice. If all the existing property is divided without notice to a creditor, that indeed may be a hardship; but it is well settled that the court has jurisdiction to divide the property even as against non-residents. But in granting the discharge the relations between the non-resident creditors and the debtor are not brought into dispute. The non-resident creditors may be assumed to have valid claims. If they have notice and come into court, they can say no more than that they have valid claims. What they may say or may not say as to their own claims will not be of assistance

to the court in rendering its decree. The decree is to be rendered upon considerations entirely apart from the validity of these particular creditors' claims. The non-resident creditors might, to be sure, if they appeared, suggest to the court that the debtor ought not to have a discharge, because he has concealed a part of his assets or been guilty of some other fraud; but this would be a suggestion based on grounds of public policy, and the court in making its decree may rely upon the assignee and the creditors who have appeared to make this suggestion, if it ought to be made. In any aspect of the case, then, there is a wide difference between insolvency proceedings looking to a discharge, and a personal action to enforce an individual right. The one is a proceeding *in rem* or *quasi in rem*, and the other is *in personam*.

Fourth Objection. — The doctrine now accepted by the courts in very many instances works great hardship, and has the effect of entirely defeating the purpose for which the insolvent law was passed. The creditors who form a part of the community in which the debtor resides, while they are forced to accept a dividend in full satisfaction of their claims, nevertheless are deprived of the hope of any future benefit which might result from the debtor's being given a chance to start again. The debtor, instead of being able to work with some hope of success for the benefit of those around him, is put in bondage to his unfriendly non-resident creditors. He must work out his debts to them before he can begin to have any benefit from his discharge. In very many cases this means that a debtor will never have a chance of starting again, and must continue in the state of despondency from which the insolvency law intended to relieve him.

Hollis R. Bailey.

LIST OF CASES.

United States Supreme Court.

Sturges *v.* Crowninshield, 4 Wheaton, 122 (1819); McMillan *v.* McNeill, 4 Wheaton, 209 (1819); Farmers, etc., Bank *v.* Smith, 6 Wheaton, 131 (1821); Ogden *v.* Saunders, 12 Wheaton, 213 (1827); Boyle *v.* Zacharie, 6 Peters, 348, 635 (1832); Andrews *v.* Pond, 13 Peters, 65 (1839); Suydam *v.* Broadnax, 14 Peters, 75 (1840); Cook *v.* Moffat, 5 Howard, 310 (1847); Baldwin *v.* Hale, 1 Wall. 223 (1863); Baldwin *v.* Bank of Newbury, 1 Wall. 234 (1863); Gilman *v.* Lockwood, 4 Wall. 409 (1866); Van Hoffman *v.* City of Quincy, 4 Wall. 550, 551 (1866); Hepburn *v.* Griswold, 8 Wall. 637 (1869); State Tax on Foreign Held

Bonds, 15 Wall. 300 (1872); Walker *v.* Whitehead, 16 Wall. 314 (1872); Edwards *v.* Kearzey, 96 U. S. 601 (1877); Denny *v.* Bennett, 128 U. S. 495 (1888); Cole *v.* Cunningham, 133 U. S. 107 (1890); Geilinger *v.* Philippi, 133 U. S. 246 (1890); Brown *v.* Smart, 145 U. S. 454 (1892); Butler *v.* Goreley, 148 U. S. 303 (1892).

UNITED STATES CIRCUIT COURTS.

Green *v.* Sarmiento, 3 Wash. C. C. 17 (1811) (Penn.); Golden *v.* Prince, 3 Wash. C. C. 313 (1814) (Penn.); Babcock *v.* Weston, 1 Gall. 168 (1812) (R. I.); Reimsdyk *v.* Kane, 1 Gall. 371 (1812) (R. I.); Adams *v.* Storey, 1 Paine's Rep. 79 (1817) (N. Y.); Le Roy et al. *v.* Crowninshield, 2 Mason, 151 (1820) (Mass.); Lonsdale *v.* Brown, 4 Wash. C. C. 155 (1821) (Penn.); Woodhull et al. *v.* Wagner, Bald. 296 (1831) (Penn.); Springer *v.* Foster, 2 Story, 383 (1843) (Mass.); Towne *v.* Smith, 1 Wood. & Min. 115 (1845) (Mass.); Perry Mfg. Co. *v.* Brown, 2 Wood. & Min. 450 (1846) (Mass.); Byrd *v.* Badger, 1 McAllister, 263 (1858) (Cal.); Davidson *v.* Smith, 1 Biss. 346 (1860) (Wis.); Von Glahn *v.* Varrene, 1 Dill. 515 (1871) (Minn.); Letchford *v.* Convillen, 20 Fed. Rep. 608 (1884) (La.); Newton *v.* Hageman, 22 Fed. Rep. 525 (1884) (Nev.); Satterthwaite *v.* Abercrombie, 24 Fed. Rep. 543 (1885) (N. Y.).

MAINE.

Judd *v.* Porter, 7 Me. 337 (1831); Stone *v.* Tibbets, 26 Me. 110 (1846); Very *v.* McHenry, 29 Me. 206 (1848); Palmer *v.* Goodwin, 32 Me. 535 (1851); Bancher *v.* Fisk, 33 Me. 316 (1851); Long *v.* Hammond, 40 Me. 204 (1855); Mansfield *v.* Andrews, 41 Me. 591 (1856); Felch *v.* Bugbee, 48 Me. 9 (1859); Chase *v.* Flagg, 48 Me. 182 (1859); Hills *v.* Carlton, 74 Me. 156 (1882); Pullen *v.* Hillman, 84 Me. 129 (1891).

NEW HAMPSHIRE.

Hall *v.* Boardman, 14 N. H. 38 (1843); Stevens *v.* Norris, 30 N. H. 466 (1855); Whitney *v.* Whiting, 33 N. H. 457 (1857); Brown *v.* Collins, 41 N. H. 405 (1860); New Market Bank *v.* Butler, 45 N. H. 236 (1864); Bell *v.* Lamprey, 57 N. H. 168 (1876); Norris *v.* Atkinson, 64 N. H. 86 (1886); Stirn *v.* McQuade, 22 Atl. Rep. 451 (1890).

VERMONT.

Perdy *v.* Walker, Brayton, 37 (1816); Herring *v.* Selding, 2 Aiken, 12 (1826); Harrison *v.* Edwards, 12 Vt. 652 (1840); Blackman *v.* Green et al., 24 Vt. 17 (1851); Peck *v.* Hibbard, 26 Vt. 698 (1854); Hall *v.* Winchell, 38 Vt. 588 (1866); Bedell et al. *v.* Scruton, 54 Vt. 493 (1882); McDougall *v.* Page, 55 Vt. 187 (1882); Roberts *v.* Atherton, 60 Vt. 563 (1888).

MASSACHUSETTS.

Proctor *v.* Moore, 1 Mass. 199 (1804); Baker *v.* Wheaton, 5 Mass. 511 (1809); Watson *v.* Bourne, 10 Mass. 337 (1813); Blanchard *v.* Russell, 13 Mass. 1 (1816); Bradford *v.* Farrand, 13 Mass. 18 (1816); Walsh *v.* Farrand, 13 Mass. 19 (1816); Prentiss *v.* Savage, 13 Mass. 20 (1816); Tappan *v.* Poor, 15 Mass. 419 (1819); Hall *v.* Williams, 6 Pick. 243 (1828); Kimberly *v.* Ely, 6 Pick. 440 (1828); Braynard *v.* Marshall, 8 Pick. 194 (1829); Boston Type, etc., Co. *v.* Wallack, 8 Pick. 186 (1829); Betts *v.* Bagley, 12 Pick. 579 (1832); Agnew *v.* Platt, 15 Pick. 417 (1834); Coffin *v.* Coffin, 16 Pick. 323 (1835); Wilmarth *v.* Burt, 7 Met. 261 (1843); Savoye *v.* Marsh, 10 Met. 594 (1845); Fiske *v.* Foster, 10 Met. 597 (1846); Woodbridge *v.* Allen, 12 Met. 470 (1847); Converse *v.* Bradley, 1 Cush. 434 (1848); Brigham *v.* Henderson, 1 Cush. 430 (1848); May *v.* Breed, 7 Cush. 15 (1851); Ilsley *v.* Merriam, 7 Cush. 242 (1851); Clark *v.* Hatch, 7 Cush. 455 (1851); Beal *v.* Burchstead, 10 Cush. 523 (1852); Scribner *v.* Fisher, 2 Gray, 43 (1854); Marsh *v.* Putnam, 3 Gray, 551 (1854); Dinsmore *v.* Bradley, 5 Gray, 487 (1855); Burrall *v.* Rice, 5 Gray, 539 (1855); Fessenden *v.* Willey, 2 Allen, 67 (1861); Kelley *v.* Drury, 9 Allen, 27 (1864); Choteau *v.* Richardson, 12 Allen, 365 (1866); Stoddard *v.* Harrington, 100 Mass. 87 (1868); Brown *v.* Bridge, 106 Mass. 565 (1871); Guernsey *v.* Wood, 130 Mass. 503 (1881); Murphy *v.* Manning, 134 Mass. 488 (1883); Maxwell *v.* Cochran, 136 Mass. 73 (1883); Eustis *v.* Bolles, 146 Mass. 413 (1888); Phenix Nat. Bank *v.* Batcheller, 151 Mass. 589 (1890); Regina Flour Mill Co. *v.* Holmes, 156 Mass. 11 (1892).

RHODE ISLAND.

Pattison *v.* Wilbur, 10 R. I. 448 (1873).

CONNECTICUT.

Pettit *v.* Seaman, 2 Root, 178 (1795); Smith *v.* Mead, 3 Conn. 253 (1820); Hammet *v.* Anderson, 3 Conn. 304 (1820); Medbury *v.* Hopkins, 3 Conn. 472 (1820); Woodbridge *v.* Wright, 3 Conn. 523 (1821); Atwater's Adm'r *v.* Townsend, 4 Conn. 47 (1821); Smith *v.* Healy, 4 Conn. 49 (1821); Boardman *v.* DeForest, 5 Conn. 12 (1823); Hempstead *v.* Reed, 6 Conn. 480 (1827); Norton *v.* Cook, 9 Conn. 314 (1832); Anderson *v.* Wheeler, 25 Conn. 603 (1857); Easterly *v.* Goodwin, 35 Conn. 279 (1868).

NEW YORK.

Van Raugh *v.* Arsdaln, 3 Caines, 154 (1805); Smith *v.* Smith, 2 Johns. 235 (1807); Penniman *v.* Meigs, 9 Johns. 325 (1812); Hicks *v.* Brown, 12 Johns. 142 (1815); M'Menomy *v.* Murray, 3 Johns. Ch. 435

(1818); Mather *v.* Bush, 16 Johns. 233 (1819); Roosevelt *v.* Cebra, 17 Johns. 108 (1819); Post *v.* Riley, 18 Johns. 54 (1820); Matter of Wendell, 19 Johns. 153 (1821); Murray *v.* DeRottenham, 6 Johns. Ch. 52 (1822); Hicks *v.* Hotchkiss, 7 Johns. Ch. 297 (1823); Sherill *v.* Hopkins, 1 Cowen, 103 (1823); Wyman *v.* Mitchell, 1 Cowen, 316 (1823); Raymond *v.* Merchant, 3 Cowen, 147 (1824); M'Neilly *v.* Richardson, 4 Cowen, 607 (1825); Jacques *v.* Marquand, 6 Cowen, 497 (1826); Sebring *v.* Mersereau, 9 Cowen, 344 (1827); Parkinson *v.* Scoville, 19 Wend. 150 (1838); Van Hook *v.* Whitlock, 26 Wend. 43 (1841); Hoyt *v.* Thompson, 5 N. Y. 320 (1851); Gardner *v.* Oliver Lee's Bank, 11 Barb, 558 (1852); Donnelly *v.* Corbett, 7 N. Y. 500 (1852); Olyphant *v.* Atwood, 4 Bosw. 459 (1859); Lester *v.* Christalar, 1 Daly, 29 (1860); Soule *v.* Chase, 39 N. Y. 342 (1868); Pratt *v.* Chase, 44 N. Y. 597 (1871); Phelps *v.* Borland, 103 N. Y. 406 (1886).

NEW JERSEY.

Hale *v.* Ross, 2 & 3 N. J. L. 590 (1811); Vanuxem *v.* Hazlehurst, 4 N. J. L. 192 (1818); Oldens *v.* Hallet, 5 N. J. L. 468 (1819); Rowland *v.* Stevenson, 6 N. J. L. 149 (1822); Wood *v.* Malin, 10 N. J. L. 208 (1828); Ballantine *v.* Haight, 16 N. J. L. 196 (1837).

PENNSYLVANIA.

Miller *v.* Hall, 1 Dallas, 229 (1788); Thompson *v.* Young, 1 Dallas, 294 (1788); Donaldson *v.* Chambers, 2 Dallas, 100 (1788); Harris *v.* Mandeville, 2 Dallas, 256 (1796); Hare, Exo'r *v.* Moultrie, 2 Yeates, 435 (1799); Hilliard *v.* Greenleaf, 2 Yeates, 533 (1800); Smith *v.* Brown, 3 Binney, 201 (1810); Boggs *v.* Teacle, 5 Binney, 382 (1812); Walsh *v.* Nourse, 5 Binney, 381 (1813); Farmer's and Mechanic's Bank *v.* Smith, 3 S. & R. 63 (1817); Hobblethwaite *v.* Batturs, 1 Miles, 82 (1835); Mount *v.* Bradford, 2 Miles, 17 (1836); Carey *v.* Conrad, 2 Miles, 92 (1837); Wheelock *v.* Leonard, 20 Pa. St. 440 (1853).

MARYLAND.

McKim *v.* Marshall, 1 Harris & J. 101 (1800); Frey *v.* Kirk, 4 Gill & J. 509 (1832); Nelson *v.* Bond, 1 Gill, 218 (1843); Lizardi *v.* Cohen, 3 Gill, 430 (1845); Larrabee *v.* Talbot, 5 Gill, 426 (1847); Potter *v.* Kerr, 1 Md. Ch. 281 (1848); Evans *v.* Sprigg, 2 Md. Rep. 457 (1852); Poe *v.* Duck, 5 Md. Rep. 1 (1853); Pinckney *v.* Lanahan, 62 Md. 447 (1884); Brown *v.* Smart, 69 Md. 320 (1888); Baker *v.* Kunkel, 70 Md. 392 (1889).

VIRGINIA.

Banks *v.* Greenleaf, 6 Call, 271 (1791).

ALABAMA.

Wilson *v.* Matthews, 32 Ala. 332 (1858).

OHIO.

Smith *v.* Parsons, 1 Ohio Rep. 236 (1823); Bank of Utica *v.* Card, 7 Ohio Rep. Pt. 2, 170 (1836); Weil *v.* The State, 46 Ohio St. 450 (1889).

INDIANA.

Pugh *v.* Bussel, 2 Blackf. 394 (1831); Wiley *v.* Pavey, 61 Ind. 457 (1878).

ILLINOIS.

Mason *v.* Wash., 1 Breese, 15 (1822).

IOWA.

Collins *v.* Rodolph, 3 G. Greene, 299 (1851); Hawley *v.* Hunt, 27 Ia. 303 (1869).

MISSOURI.

Fareira *v.* Keevil, 18 Mo. 186 (1853); Crow *v.* Coons, 27 Mo. 512 (1858).

TEXAS.

Beers et al *v.* Rhea, 5 Texas, 349 (1849).

OREGON.

Main et al. *v.* Messner, 17 Oregon, 78 (1888).

CALIFORNIA.

Hanscom *v.* Tower, 17 Cal. 518 (1861); Thomas *v.* Crow, 65 Cal. 470 (1884); Rhodes *v.* Borden, 67 Cal. 7 (1885); Lowenberg *v.* Levine, 93 Cal. 216 (1892).